Exxel-Atmos, Inc. *and* United Steelworkers of America, AFL–CIO. Case 22–CA–17889

June 5, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On December 16, 1992, the National Labor Relations Board issued its Decision and Order[1] in this proceeding. The Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union and refusing to bargain with it. In addition to an order requiring the Respondent to cease and desist from this conduct, the Board imposed an affirmative bargaining order requiring the Respondent, upon the Union's request, to recognize and bargain with it.

On July 15, 1994, the United States Court of Appeals for the District of Columbia Circuit affirmed the Board's unfair labor practice findings and conclusions and enforced the remedial order with the exception of the affirmative provision requiring the Respondent to recognize and bargain with the Union.[2] The court remanded the case to the Board for an explanation justifying, beyond the cease-and-desist order, the imposition of an affirmative bargaining order. On November 4, 1994, the court denied the Board's petition for rehearing en banc.[3]

On February 1, 1995, the Board advised the parties that it had accepted the remand and invited statements of position. The Respondent and the General Counsel filed statements of position.

The National Labor Relations Board has considered its original decision and the record in light of the court's remand and the parties' statements of position.[4] We have decided to affirm the Board's previous Decision and Order.

The Board's statement of policy concerning the imposition of affirmative bargaining orders is set forth in *Caterair International*.[5] In *Caterair* we reaffirmed our longstanding policy of issuing an affirmative bargaining order as the standard appropriate remedy for the restoration of the status quo after an employer's unlawful withdrawal of recognition from an incumbent union and subsequent refusal to bargain. As we stated in *Caterair*:

> [E]xperience confirms our view that a bargaining order is routinely appropriate even when an incumbent union has lost its majority support after the employer's unfair labor practices, and even though the order will, for a reasonable period, preclude a decertification election to test the union's majority status.
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> An affirmative bargaining order certainly serves the interests of the incumbent union by restoring "the bargaining opportunity which it should have had in the absence of unlawful conduct."

Id. at 65, 67, citing *Williams Enterprises*, 312 NLRB 937, 940 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995).

We also explained in *Caterair*, that we have considered and balanced the critical statutory policies and rights relevant to the affirmative bargaining remedy and find no need to engage in a case-by-case factual analysis to justify its future imposition.

Therefore, for the reasons set forth in *Caterair*, we affirm our finding that an affirmative bargaining order is the appropriate remedy for the Respondent's unlawful withdrawal of recognition from the Union and its refusal to bargain.

The Respondent asserts that if the Board finds that an affirmative bargaining order is warranted, then the Board should expressly clarify that the decertification bar that accompanies an affirmative bargaining order applies for only 4 months from the date of the order.[6] The Respondent notes that the court stated in its remand Order that "the decertification bar (provided its duration is substantially tailored to restore to the union that part of the one-year period that was denied it by the company's unfair labor practice) simply affords the union the same protection it rightfully enjoyed during its first year."[7] The court made this observation in connection with its discussion of some policy considerations which are relevant to the issuance of an affirmative bargaining order. The court, however, specifically stated that it was up to the Board, in the first instance, to make labor policy.

The Board's view of this matter was recently set forth at length in *Lee Lumber & Building Material Corp.*, 322 NLRB 175 (1996). In *Lee Lumber*, the Board noted (at 177) that an employer's unlawful re-

[1] 309 NLRB 1024.

[2] 28 F.3d 1243 (D.C. Cir. 1994).

[3] 37 F.3d 1538 (D.C. Cir. 1994).

[4] We reject the Respondent's contention that the Board should not reconsider imposing an affirmative bargaining order to remedy its 1991 unfair labor practices as the issue is moot because the Board proposed that the court enter a judgment containing a cease-and-desist order. The court's enforcement of the cease-and-desist portion of the order does not render moot the question of whether an affirmative bargaining order is appropriate. The court specifically remanded, for explanation, the issue of whether an affirmative bargaining order is a necessary remedy.

[5] 322 NLRB 64 (1996).

[6] This figure is based on the Respondent's view that the court required only that it recognize and bargain with the Union for 1 year. Since 8 months had elapsed between the Respondent's September 1990 voluntary recognition of the Union and its May 1991 refusal to bargain, the Respondent claims that the Board can only require it to bargain with the Union for the 4 months remaining in this 1-year period.

[7] 28 F.3d 1243 at 1248.

fusal to recognize and bargain with an incumbent Union is likely to have "a significant, continuing detrimental impact on employees, causing them to become disaffected from the union." Requiring the employer that has engaged in this unlawful conduct to bargain for a "reasonable time" is aimed at to restoring the union to the position it would have been in absent the unlawful withdrawal of recognition.[8] A "reasonable time" does not depend on either the "passage of time or on the number of meetings between the parties, but instead on what transpired and what was accomplished during the meetings." Id. at 179. In assessing whether there has been bargaining for a reasonable time the Board considers the degree of progress made in negotiations, whether or not the parties are at impasse, and whether the parties are negotiating for an initial contract.[9] Obviously, the determination of whether a reasonable time has elapsed cannot be made prospectively, but can only be made after an examination of the bargaining history.

Accordingly, we adhere to the Board's earlier determination that an affirmative bargaining order requiring that the parties bargain is the appropriate remedy. And, consistent with our rationale in Lee Lumber, we shall require the Respondent, upon the Union's request, to bargain with it for a "reasonable period."

ORDER

The National Labor Relations reaffirms its original Order, reported at 309 NLRB 1024 (1992), and orders that the Respondent, Exxel-Atmos, Inc., Somerset, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

[8] In *Lee Lumber*, we held that in the absence of special circumstances—not here applicable—the presumption of unlawful taint caused by an employer's unlawful withdrawal of recognition and refusal to bargain "can be rebutted only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Id. at 178.

[9] Id.